U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Issue Date: 25 June 2003

CASE NO.: 2002-ERA-0012

In the Matter of:

ALAN R. OSMAN,
Complainant,

v.

EXELON NUCLEAR,
Respondent.

Before: PAMELA LAKES WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
DISMISSING COMPLAINT

This is a proceeding brought under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, 29 C.F.R. Part 24. The pertinent provision protects employees against discrimination for attempting to carry out the purposes of the ERA, and prevents employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblowing" complaints or for engaging in other protected activities.

STATEMENT OF THE CASE

The complaint in the instant case, dated October 15, 2001, was filed with the Occupational Safety and Health Administration (OSHA) in North Aurora, Illinois on October 19, 2001 and, following an investigation, on December 28, 2001, OSHA issued its determination finding the complaint to lack merit. Complainant's hearing request, dated January 4, 2002, was mailed by express mail (second day delivery) on January 5, 2002, filed on January 9, 2002, and received by the undersigned on January 11, 2002.

The hearing was originally scheduled for March 4 to 5, 2002 in Chicago, Illinois, but by Order of February 23, 2002, the hearing was cancelled and proceedings were stayed so

that the Complainant, who was unrepresented, could seek counsel. Thereafter, the hearing was rescheduled for June 26 to 27, 2002. However, the unrepresented Complainant advised by letter of June 21, 2002, transmitted by facsimile, that he would be unable to attend the hearing and wished to proceed upon a paper record, including his own letter statement and the statements of other individuals filed on March 4, 2002. On June 20, 2002, Respondent submitted "Respondent's Motion for Default Judgement or Alternatively for Adjournment to Complete Discovery" filed by facsimile on June 20, 2002. That Motion was based upon Complainant's refusal to attend a deposition in Chicago allegedly due to driving restrictions.

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The undersigned's Order Cancelling Hearing and Scheduling Proceedings of June 21, 2002 construed Complainant's correspondence as a motion for hearing on the record and denied Respondent's motion as moot. The Order further canceled the hearing set for June 26 to 27 and provided that the hearing would be conducted on a paper record, with all evidence to be submitted by July 31, 2002, and all briefing to be completed by August 30, 2002, which periods could be extended for good cause shown. By a letter to the parties of August 19, 2002, this schedule was amended to provide that Respondent submit its evidence by August 23, 2002, that Complainant submit rebuttal evidence by September 15, 2002, and that briefing be completed by September 30, 2002 or October 15, 2002, depending upon whether rebuttal evidence were submitted.

Thereafter, the following evidence was submitted: Complainant's Exhibits 1 through 5 [hereafter "CX1" through "CX5"] were submitted on July 29, 2002;[1] Respondent's Exhibits 1 through 8 [hereafter "RX1" through RX8"] were submitted on August 19, 2002; and Complainant's Rebuttal consisting of 24 "attachments" [which will be referenced herein as "CX6 (1)" through "CX6 (24)"] together with Complainant's position statement responding to assertions in Respondent's exhibits [which will be referenced as "CX6" or "Rebuttal"] was submitted on September 6, 2002. In addition, an Employee Contact Record for a June 28, 2001 rigging incident relating to Complainant was submitted by Respondent under cover letter of July 26, 2002 and has been marked as Respondent's Exhibit 14 ["RX 14"].[2]

By letter of September 30, 2002, filed on October 2, 2002, Respondent, through counsel, moved to supplement the record in order to respond to Complainant's rebuttal. Respondent further indicated that the rebuttal materials submitted by Complainant were of "questionable legal relevance" and "gravely misstate facts and omit critical details" and that these misstatements and omissions "highlight the appropriateness of a hearing to resolve any factual disputes" determined to be material. Although in general supporting "efforts to resolve matters efficiently on the pleadings," Respondent indicated that it would prefer cross examination of Complainant and his witnesses at a hearing concerning Complainant's recent submission and that a hearing would more appropriately allow full consideration of any factual disputes. However, Respondent suggested that if the undersigned wished to adjudicate such disputes without a hearing, that it be allowed to

supplement the record by October 18, 2002, and that briefs addressing the merits be filed simultaneously on November 1, 2002.

Complainant's October 6, 2002 letter, filed on October 9, 2002, responded to Respondent's September 30, 2002 letter motion and requested that no further extensions be granted.

After consideration of the submissions by the parties, I agreed with Respondent's counsel that a hearing would be required if there were material issues of fact. I therefore decided to treat the submissions of the parties as cross motions for summary decision. ***See*** 29 C.F.R. §§ 18.40, 18.41.

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Accordingly, my Order Amending Scheduling Order of October 7, 2002 advised the parties that I would review their evidentiary submissions and arguments and determine whether a genuine issue of material fact had been raised. If not, I would issue a decision on the merits, but if there were a genuine issue of material fact, I would set this matter for an oral hearing. Respondent was allowed until November 1, 2002 to submit any evidence in response to Complainant's submissions, limited to the new matters raised in Complainant's rebuttal. Complainant was permitted no further evidentiary response but was allowed to state whatever material issues of fact he believed to have been raised in Respondent's submission and what factual assertions he disputed. The parties were ordered to simultaneously submit their briefs or written arguments on or before December 2, 2002, and to include a statement of material facts as to which there was no dispute and a statement of material facts which were in dispute (if any) as a part of their submissions.

Respondent's Supplemental Exhibits 9 through 13 [hereafter "RX9" through "RX13"] were submitted under cover letter of November 1, 2002 and filed on November 4, 2002. Respondent's Brief and Statement of Material Facts that Are Not in Dispute were filed on December 3, 2002. There were no additional filings by Complainant. However, Complainant's complaint of October 15, 2001 (hereafter "Complaint") and rebuttal of September 6, 2002 (hereafter "CX6" or "Rebuttal"), will be considered as argument on behalf of Complainant both on the ultimate issue and on the issue of whether there are material issues of fact.[3]

For the purposes of the summary decision proceedings, the record consists of Complainant's Exhibits CX1 through CX5, CX6(1) through CX6(24), together with the Complaint of October 15, 2001 (Complaint) and Rebuttal of September 6, 2002 (CX6), and Respondent's Exhibits RX1 through RX8, RX9 through RX13, and RX14. **SO ORDERED.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STANDARD FOR SUMMARY DECISION

Twenty-nine C.F.R. §18.41, Summary decision, provides, in relevant part:

> (a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision shall conform to the requirements for all final decisions.
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> (b) *Hearings on issue on fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

See also Rule 56, Fed. R. Civ. P. Under section 18.40(c) of 29 C.F.R., an administrative law judge may consider affidavits setting forth facts that would be admissible in evidence and establishing the competence of the affiant to testify as to the matters stated. The same section provides that a party opposing a summary decision motion "may not rest upon the mere allegations or denials of such pleading" and "must set forth specific facts showing that there is a genuine issue of fact for the hearing." ***Id.***

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STATEMENT OF FACTS

Background

Complainant's Employment and Supervision. Complainant Alan R. Osman has been employed at the Dresden Station [the Dresden Nuclear Generation Station in Dresden, Illinois] since March 1992. (Complaint, CX1 to CX5).[4] Complainant worked as an "A" Mechanic under the supervision of James Mau beginning in December 2000, when Mau became a supervisor in the Facilities Maintenance Department. (RX1, Mau. Aff.¶1). Work assignments for an "A" Mechanic included cleaning the shop and cleaning the outbuildings, and "A" Mechanics were routinely assigned to work in other maintenance departments. (RX1, Mau. Aff.¶2). Complainant was granted a transfer from the facilities maintenance group at the beginning of the year 2002 and is no longer under Mau's supervision. (RX 11, Mau Supp. Aff. ¶ 6).

Performance appraisal sheets. During the course of his supervision of Complainant, Mau prepared Performance Appraisal Data sheets ("PADs") with entries from December 18, 2000 until October 29, 2001.[5] (RX1, Att. 2). These sheets reflect a rocky course, chronicling disagreements between Mau and Complainant over the leave to which he was entitled and restrictions due to his light duty status. (***Id.***) Mau was also critical of Complainant's work ethic and lack of initiative almost from the start.[6] (***Id.***)

Complainant's Alleged Protected Activity

Complainant's reporting of inappropriate package closure and alleged document falsification. The incident which gave rise to this action occurred in May 2001. On May 7, 2001, Mau assigned Complainant and a co-worker (Art Kleinfeld) to perform preventative maintenance on various security doors and turnstiles within the plant. (RX1, Mau. Aff. ¶3, Att. 2; CX 6(9)). This work entailed inspecting the doors, completing a checklist, identifying specific problems, and making minor repairs. (***Id.***) At the end of their shift on May 7 or 8,[7] Complainant and Kleinfeld had not completed all of the inspections but Mau nevertheless entered into the computer database that this project had been completed.[8] (RX1, Mau. Aff.¶4). The following morning, when Complainant and Kleinfeld arrived at work and were assigned to complete the project, they checked the computer listing and discovered that it had been closed out. (***Id.***)

Complainant initiated a Condition Report (#D2001-02550) for this incident on or about May 10, 2001, which was described as "Inappropriate closure of package." (RX3). That Report provided, under "Condition Description/Recommended Improvement" in the Originator section:

> Facilities Supervisor was informed on [T]ues 5-8-01 at end of day that package (990258214-01) was not complete. On morning of 5-9-01 we were reassigned the same package to complete what we didn't the day before, we were pre-job[b]ed and told we were ready to go. Upon getting tools for job it was brought to our attention that our package was closed day before [T]ues 5-8-01 to avoid taking a schedule hit. So we peer checked and double verified that package was statused "ready to work" and package was indeed closed on 5-8. Took package back to facilities supervisor and informed him of problem with package and he tried to get us to work under a "facilities blanket" work request. Informed him we needed original package to continue. So facilities supervisor got package re-statused to work, when we received the package the second time 4 hrs later supervisor signed off mechanic[']s name on work completed without mechanic[']s knowledge and put day before date 5-8 on it, then one lined (sign off and date) put correct date 5-9 on cover page of package. [S]upervisor signed off on 11 inspections that were completed and did not sign off on the 3 inspections that were not done so supervisor was aware that package was not complete when package closeout was done.

(RX 3). In the Supervisor section of the Condition Report, Mau disputed this account

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and, although admitting that the package closure was his mistake, stated under "Why It Happened":

> No turnover sheet was written up by crew and fls [first line supervisor] didn't make crew repeat information about doors. Fls was told that they

> finished the door they were on, but was not told that three more doors needed to be finished. Not all information in description is correct. FLS missed the three sign off[s] for the doors that were not done. Fls closed package that he believed was complete. No action required, use for trending only.

(***Id.***) Mau indicated under "Proposed Solution" that he had coached his crew and had been coached by his own supervisor. (***Id.***)[9]

Alleged Acts of Retaliation

Complaint. In his October 15, 2001 complaint, Complainant alleged that actions were taken against him in retaliation for filing this Condition Report, including:

(1) scheduled leave was taken away from him by his supervisor on May 10 and was only given back to him after it was brought to the attention of Vanessa Polaine, of Human Resources, and Al Zuccarello, Union representative;

(2) he was written up when he feels it was not warranted, and specifically he was written up for poor attendance (allegedly based upon three instead of the required four occurrences within a rolling twelve-month period, two of which were work-disability related and the third of which was due to his becoming ill after working in the rain without requested raingear), and he was also wrongfully written up for poor rigging practices;

(3) he was docked pay on July 20, 2001, when he was sent to see a company doctor;

(4) Mau "tried to force [him] to take a vacation day" on September 24, 2001, after he was told that he did not have to use one;

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(5) he was docked for attending a meeting with Corporate on September 25, 2001;

(6) he was given unfavorable job assignments as punishment, including cleaning the shop, cleaning outbuildings, and being loaned out to other foremen;

(7) he has been harassed by his supervisor, as evidenced by his supervisor stating that "he was going to get [Complainant]" and by his supervisor "continually focusing on [him]";

(8) he was denied shift choice by seniority on October 5, 2001;

(9) his supervisor told him that he would be written up for waiting for his partner while his partner was in the bathroom on October 8, 2001, even though he had to ask several

times before he was given an assignment (to clean the shop), and his partner was not written up or assigned another job.

(Complaint). The factual bases for these allegations are discussed below.

Alleged revoking of previously approved leave on May 10, 2001. The parties agree that Complainant was authorized to take a half-day of leave on the afternoon of Friday, May 11, 2001. (***E.g.,*** RX 8). Complainant alleges that on Wednesday, May 9, he asked for the half-day leave for Friday, May 11, and that Mau approved the leave the morning of May 10 but reneged later that day, after he saw Complainant filling out the Condition Report. (CX6, Rebuttal p. 3). Supervisor Mau asserts that "[o]n or about May 10, 2001" he had denied the Complainant's leave request for that same day but had approved it for May 11. (RX1, Mau. Aff.) According to Al Zucarello [the union steward], he was present on May 10 when Mau approved of Complainant's half day leave for May 11, and he was also present when Mau informed him that the leave "wasn't a done deal." (CX6(1), Zucarello Dec.; CX6). Zucarello claims that Complainant advised him that the leave had been "officially denied" by Mau later on May 10, prompting him to contact Human Resources, after which the leave for May 11 was granted. (***Id.***)

Denial of rain gear requested in April or May 2001. Complainant asserts that one of the absences culminating in his August 2001 absence interview with Mau (discussed below) resulted from his having become ill after working in the rain without rain gear, which he had previously requested. (Complaint; CX6, Rebuttal p. 4). Mau acknowledges that Complainant requested rain gear in May 2001, at which time no rain gear was available, but claims that he ordered rain gear (as evidenced by a 5/21/01 Material Request form) and he provided Complainant and other workers with rain suits when they were received on or about June 21, 2001. (RX1, Mau. Aff. ¶7, Att.1; RX11, Mau Supp. Aff. ¶3). Complainant claims to have requested rain gear in April 2001 but denies having ever received it. (CX6, Rebuttal p. 2).

Allegations of harassment by supervisor during June 7, 2001 meeting with Human Resources. Vanessa Polaine of Human Resources states that she met with Complainant at his request on or about June 7, 2001 and that he complained of harassment by his supervisor but was unable to provide any specifics apart from an alleged statement by Mau to the effect that he was "going to get" Complainant. (RX 4, Polaine Aff. ¶7). Complainant asserts that he gave Polaine specific examples of harassment[10] during the June 7 meeting, including the statement Mau made to his coworker, Bryan Thouvenin, to the effect that he was "going to get" him. (CX6, Rebuttal p. 4). Thouvenin verified that Mau told him that he was "going to get" Complainant and for him not to let Complainant "take [him] down with him." (CX6(19), Thouvenin Dec.; ***see also*** Complaint; CX6, Rebuttal p. 3). In a supplemental declaration, Thouvenin states that he witnessed Mau "call [Complainant] down for talking when [Thouvenin] initiated the conversation and not say anything to [Thouverin] or anyone else that was talking." (CX6(4), Thouvenin Supp. Dec.) Mau denies having told anyone that he was going to get Complainant and he asserts that he has not discriminated against or mistreated Complainant. (RX1, Mau. Aff. ¶ 12). Although Polaine claimed that Thouvenin denied having heard Mau make the

statement that he was "going to get" Complainant, Thouvenin denies having been interviewed by her. (RX 4, Polaine Aff. ¶7).

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Counseling for poor rigging/cribbing practices in June 28, 2001 incident. After being assigned to do work for another supervisor, Brian Springer, Complainant and two other "A" mechanics received job counseling for poor rigging practices as a result of an accident that occurred on June 26, 2001, when a load carried by a crane became loose and fell onto the cribbing. (RX6, Springer Aff., Att. 1; RX14). According to Springer, job counseling is "not a form of discipline but instead is coaching to improve work practices and to document the event in case there are problems in the future relating to the individual's failure to engage in proper practices." (RX6, Springer Aff. ¶4). Springer asserts that he was unaware of the "Inappropriate closure of package" Condition Report "or other concern expressed by Alan Osman concerning Jim Mau's documenting of a work package for inspection of security doors" when he counseled Complainant for the rigging incident. (RX6, Springer Aff. ¶5). A Condition Report [#D2001-03408] was also prepared based upon the allegedly poor rigging practices. (RX5).[11]

Docking of pay for July 20, 2001 doctor visit. On or about July 17, 2001, Complainant fainted at work and stayed home for a few days. (RX1, Att. 2; RX4, Polaine Aff. ¶5). Upon his return on July 20, he did not have a doctor's slip and the Dresden Station nurse would not release him for work. (***Id.***) According to the performance appraisal sheets, Mau sent him home to get the slip, based upon advice provided by Human Resources. (RX1, Att. 2.) Consistent with the normal practice of Human Resources, Complainant was docked for four hours of pay on July 20, 2001. (RX4, Polaine Aff. ¶5). Complainant claims that he should not have been charged for four hours of leave because he was sent to a company doctor (not home) to obtain the work release and that he was only off-site for two hours. (CX6, Rebuttal.) Complainant's September 20, 2001 grievance on this matter was settled on or about January 8, 2002 and he was paid for the four hours. (RX 12).[12]

Counseling for absences on August 20 or 22, 2001. Complainant was counseled for excessive absences on or about August 22, 2001, as directed by Human Resources. (RX1, Mau Aff. ¶6; RX4, Polaine Aff. ¶3, Att. II).[13] This counseling was based upon Complainant having more than three "Code 22" (disability) absences during a rolling 12-month period from July 28, 2000 through July 20, 2001, as follows:

07/28/2000 to 07/31/2000	Passed out at work the day before. Is going to dr. and the dentist for chipped tooth.
09/06/2000 to 09/13/2000	Went to Dr. for his back
05/23/2001 to 05/23/2001	Headache, sore throat, upset stomach
07/18/2001 to 07/20/2001	Dr. told to stay home due to Al passing out.

(RX4, Polaine Aff. ¶3, Att. II, III). Exelon Nuclear's Absence Control Policy effective July 16, 2001 requires an Absence Interview to be conducted by an employee with that employee's supervisor if the employee had more than three occurrences of a disability absence (Code 22) in a rolling 12-month period. (RX4, Polaine Aff. ¶3, Att. I). Complainant asserts that there were only three absences during the 12-month period (based

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upon his working back one year from the time of August 20, 2001 counseling, and thus not counting the first of these absences), and that at least two of these absences should have been charged to Code 21 (industrial disability), because they were related to work injuries, and a third occurred when he had become ill while working in the rain without raingear. (Complaint; CX6, Rebuttal p. 2). The Employee Records Review Checklist completed and signed by Mau indicates that Complainant was advised of the possible outcome of the absence interview, specifically that the incident "may lead to formal discipline if improvement is not seen." (RX4, Polaine Aff. Att. III). However, according to Vanessa Polaine, Senior Human Resources Representative at Dresden Station, "[t]he absence interview is not considered to be the administration of discipline." (RX4, Polaine Aff. ¶2). Polaine asserts she was unaware of the May 2001 Condition Report when she initiated the action. (RX4, Polaine Aff. ¶3). An "absence interview" was previously conducted between Complainant and Mau on July 11, 2001, based upon four Code 22 absences from June 21, 2000 to May 25, 2001, and a similar interview was conducted in 1994.[14] (RX1 Att. 1; RX4 Att.II).

Charging leave for September 25, 2001 mediation and/or revocation of approval for paid absence on September 24, 2001. On or about September 25, 2001, Complainant attended a mediation with the Equal Employment Opportunity Commission concerning discrimination charges he brought against Respondent. (RX4, Polaine Aff. ¶6). Mau forwarded Complainant's request for paid time off to Polaine. (***Id.***) In accordance with its past policy and practice, pursuant to which employees of Respondent are not paid for time off related to legal actions against Respondent, Complainant's request was denied by Polaine. (***Id.***) Complainant claims that Mau "tried to force [him] to take a vacation day" on September 24, 2001, after he was told that he did not have to use one. (Complaint).[15] Complainant also asserts that because the mediation was requested by Respondent, he should not have been charged leave. (CX6, Rebuttal, p. 4).

Denial of shift change on October 5, 2001. Based upon his seniority, Complainant had requested the day shift (7:00 a.m. to 3:00 p.m.). (RX 11, Mau Supp. Aff. ¶ 5). During an outage, Complainant sought to change his shift to afternoons (3:00 p.m. to 11:00 p.m.) on a temporary basis. (CX6, Rebuttal p. 3; Mau Supp. Aff. ¶5). Another "A" mechanic, Mary Kay Bregar, volunteered to switch with Complainant and take the day shift on or about the week of October 5, 2001. (CX6(18), Bregar Dec.). She claims that Respondent's "not allowing [Complainant] to exercise his seniority rights for shift pick" caused her hardship. (***Id.***) However, Mau asserts that he denied the shift change based

upon workload needs, and he asserts that seniority rights do not apply to temporary shift changes, for which supervisory permission is required. (RX1, Mau Aff. ¶10, Att. 2). In his supplemental affidavit, Mau explained that before he requested the shift change, Complainant had already participated in a "walk-down" training exercise with the safety training supervisor, John Harlach, and a reassignment would require that the exercise be repeated with the new employee. (RX11, Mau Supp. Aff. ¶ 5). Harlach verifies Mau's account and denies any prior knowledge of Complainant's claim against Respondent. (RX 10, Harlach Aff. ¶¶ 3 to 5, 6). However, Mau's contemporaneous Performance Appraisal Data Sheets discuss Mau's over scheduled work and do not mention the "walk-down" time consideration. (RX1, Att. 2).

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Loitering in locker room on October 8, 2001. As noted above, Complainant asserts that he was harassed by his supervisor (Mau), who continually focussed on him. (Complaint). An example Complainant gives of such harassment took place on October 8, 2001. Mau claims that on that date he found Complainant "loitering in the locker room at a time when he was off the job without supervisor permission." (RX 1, Mau Aff. ¶9). Mau's Performance Appraisal Data Sheets confirm that account, and note that Complainant "was away from the job and didn't call her supervisor." (RX 1, Att. 2). Complainant asserts that he advised Mau that he was waiting in the locker room after having used the restroom (for which no permission was necessary) and that he was waiting for his partner to finish before returning to work. (CX6, Rebuttal p. 2-3).

Unfavorable job assignments as punishment. As noted above, Complainant asserts that during the course of his supervision by Mau, he has been assigned a disproportionate number of undesirable jobs, including cleaning the shop, cleaning outbuildings, and being loaned out to other foremen. (Complaint). Complainant acknowledges that cleaning the shop and outbuildings are job assignments for an "A" mechanic but asserts that he was given these assignments more often than other "A" mechanics as a form of punishment and was assigned to clean areas outside of his supervisor's responsibility. (CX6, Rebuttal p. 1). Three of his coworkers have also stated their perception that Complainant has frequently been assigned less desirable job assignments as a type of punishment or retaliation, but no specifics have been provided. (CX6(1), Zucarello Dec.; CX6(2), Bregar Dec.; CX6(3), Thouvenin Dec.; CX6(4), Thouvenin Supp. Dec.) Mau denies having treated Complainant differently from the other "A" mechanics and states that during 2001, he had approximately nine MMD "A" mechanics assigned to him, that he routinely assigned each of them to clean the outbuildings with the same frequency he asked Complainant, and that he could only recall one occasion when he asked Complainant to clean the shop. (RX 11, Mau Supp. Aff. ¶ 2).

LEGAL BACKGROUND

The employee protection provisions of the Energy Reorganization Act (ERA) provide the following:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) --

(A) notified his employer of any alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter of the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding, or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851(a)(1).

Subsection (b) of the same section, which was amended in 1992, sets forth specific procedures for addressing "whistleblower" complaints filed under the ERA and provides for burdens of proof unique to the ERA. Specifically, subparagraph (A) of subsection (b)(3) provides that the complaints shall be dismissed unless the complainant has made a prima facie showing that the behavior complained of was a contributing factor in the unfavorable personnel action alleged in the complaint and subparagraph (B) of subsection (b)(3) provides that no investigation shall be conducted if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. The criteria for ultimately prevailing is set forth in subparagraphs (C) and (D) of subsection (b)(3):

> (C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> (D) Relief may not be ordered under paragraph (2) [of subsection (b)] if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

42 U.S.C. § 5851(b)(3).

Initially, a complainant must "pass a gatekeeper test" and must establish a prima facie case before an investigation is commenced. ***Stone & Webster Engineering Corporation v. Herman***, 115 F.3d 1568 (11th Cir 1997). To establish a prima facie case under the ERA, a complainant must establish:

> 1) the complainant engaged in protected activity; 2) the respondent employer was aware of complainant's engagement in protected activity; 3) the respondent employer subjected complainant to an adverse employment action with respect to her compensation, terms, conditions, or privileges of employment; 4) the respondent is within the term "employer" as defined by ERA § 5851(a)(2)[;] and 5) a nexus exists between the protected activity and the adverse employment action.

Bauer v. U.S. Enrichment Corp., ARB No. 01-056, 2001-ERA-9 (ARB May 30, 2003). ***See also Bartlik v. U.S. Department of Labor,*** 73 F.3d 100, 103 n. 6 (6th Cir. 1996) (listing different standards applied by Courts and finding "slight variation," in that "the common thread is that plaintiff must set forth facts which justify an inference of retaliatory discrimination").

If an ERA case proceeds to a hearing, a complainant must prove the same elements as required to establish a prima facie case, and specifically the complainant must show by a preponderance of the evidence that his protected activity was a contributing factor in an unfavorable personnel decision or adverse action.[16] ***Trimmer v. Los Alamos National Laboratory,*** ARB No. 96-072, 1993-CAA-9, 1993-ERA-55 (ARB May 8, 1997), ***aff'd sub nom Trimmer v. U.S. Dept. of Labor,*** 174 F.3d 1098 (10th Cir. 1999);[17] ***Dysert v. Florida Power Corp***., 1993-ERA-21 (Sec'y, August 7, 1995), ***aff'd sub nom Dysert v. Secretary of Labor***, 105 F.3d 607 (11th Cir. 1997). Only if the complainant meets this burden does the burden shift to the respondent to produce clear and convincing evidence establishing that it would have taken the same unfavorable personnel action in the absence of such activity. ***Trimmer***, 174 F.3d at 1101-02 (citing § 5851(b)(3)(D)).[18]

A nexus between the protected activity and the adverse employment action may be established inferentially or directly. Temporal proximity may be sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. ***See Couty v. Dole,*** 886 F.2d 147, 148 (8th Cir. 1989). ***See also Simon v. Simmons Foods, Inc.,*** 49 F.3d 386, 389 (8th Cir. 1995). In such an "inferential" case, when a respondent has articulated a nondiscriminatory basis for its action, the inference of discrimination disappears, and the complainant must then demonstrate that the reasons proffered by the respondent were not the true basis for the adverse action, but were a pretext for discrimination, under the framework of proof for title VII cases. ***Overall v. Tennessee Valley Authority,*** ARB Nos. 98-111, 98-128, 1997-ERA-53 (ARB April 3, 2001). If the employer has established legitimate reasons and the complainant also proves illegal motive (through evidence directly reflecting the use of an illegitimate criterion in the challenged decision),[19] the case is a "dual motive" or "mixed motive" case, and the burden shifts to the respondent to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of protected activity. ***Talbert v. Washington Public Power Supply Systems,*** ARB No. 96-23, 1993-ERA-35 (ARB Sept. 27, 1996). ***But cf. Desert Palace dba Caesar's Palace Hotel & Casino v. Costa,*** No. 02-679, – U.S. – (U.S. S.Ct. June 9, 2003) (under the 1991 amendments to Civil Rights Act, direct evidence of discrimination is unnecessary to obtain a mixed-motive jury instruction).

To be actionable, the alleged adverse employment action must involve a tangible job detriment (such as dismissal, failure to hire, or demotion) or it may take the form of harassment that is sufficiently pervasive as to alter the conditions of employment and create an abusive or hostile work environment. ***Berkman v. U.S. Coast Guard Academy,*** ARB No. 98-056, ALJ No. 1997-CAA-2 (ARB Feb. 29, 2000). ***See also Martin v. Dept. of Army,*** ARB No. 96-131, 1993-SDW-1 (ARB July 30, 1999).

DISCUSSION

To prevail in a whistleblower case under the ERA, a complainant must establish that he was employed by an employer covered by the ERA; that he engaged in protected activity during the course of that employment; that the employer was aware of his involvement in the protected activity; that he was subjected to an adverse employment action; and that there is a nexus between the protected activity and the adverse employment action. ***See Bauer, supra. See also Fugate v. Tennessee Valley Authority,*** ARB No. 96-100, 1995-ERA-50 (ARB Dec. 12, 1996).

At the outset, I note that the Respondent has not disputed that it is covered by the term "employer" under the ERA. ***See*** 42 U.S.C. § 5851(a)(2) (defining employer as including Nuclear Regulatory Commission licensees or applicants, or contractors or subcontractors thereof, and certain Department of Energy contractors or subcontractors).

It is also clear from the undisputed facts that the Complainant engaged in protected activity while employed by Respondent and that the Respondent was aware of his involvement in protected activity. In this regard, it is undisputed that Complainant filed a May 10, 2001 Condition Report (#D2001-02550, "Inappropriate closure of package") alleging that his supervisor improperly reported that safety inspections and preventative maintenance on various security doors and turnstiles within the Dresden Nuclear Generation Station had been completed, when, in fact, they had not been completed. The Condition Report also alleged document falsification associated with the improper reporting. Although the supervisor has disputed certain of the matters alleged by Complainant in the Condition Report, it has not been disputed that the Condition Report was prepared in May 2001 and that Complainant's supervisor was aware of its contents, and in fact prepared the supervisory section of the Condition Report. I find that, as the filing of the Condition Report by Complainant was ostensibly in furtherance of safety compliance within a nuclear plant, it falls within the broad purview of the Energy Reorganization Act. ***See generally Stone & Webster Engineering Corp. v. Herman,*** 115 F.3d 1568 (11th Cir. 1997) (communications made in furtherance of safety compliance held to constitute protected activity under ERA). I also find that, as the Condition Report was an official record completed in part by Complainant's supervisor, Respondent had notice of Complainant's protected activity. ***See generally Jenkins v. EPA,*** ARB No. 98-146, 1988-SDW-2 (ARB Feb. 28, 2003) at 17 (knowledge by employer of both internal and external protected activity may be assumed from circumstances).

Complainant cannot, however, prevail in this matter, because he has not alleged adverse employment actions cognizable under the ERA. In this regard, a close examination of the acts of which Complainant complains reveals that they did not individually have tangible job consequences. ***See generally Berkman, supra.*** "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." ***Burlington Industries, Inc. v. Ellerth,*** 524 U.S. 742, 760-61 (1998) (Title VII case defining standard without adopting it). Moreover, when considered in the aggregate, the series of events chronicled by Complainant do not reflect harassment sufficiently pervasive so as to create a hostile work environment or otherwise alter the terms, conditions, or privileges of employment. ***See Berkman, supra.***

The actions that Complainant alleges were taken against him in retaliation for filing the Condition Report fall into several categories. The first category relates to leave and attendance, and he claims that he was either denied leave, was charged the wrong kind of leave, or was wrongfully disciplined based upon his attendance record. The second category relates to counseling for job performance, and he claims he was wrongfully counseled on a single occasion. The third category relates to his work assignments, and he claims he was assigned less favorable job assignments, and that he was denied a shift change to which he was entitled based upon his seniority. The last category relates in

general to harassment by his supervisor, including the assertion that his supervisor continually focused on him and had commented that he was going to "get" him.

In considering the substance of these allegations, I am guided by the Administrative Review Board ("Board" or "ARB") decision in ***Shelton v. Oak Ridge National Laboratories,*** ARB No. 98-100, 1995-CAA-19 (ARB March 30, 2001). In that case, after a lengthy trial over which I presided, I found that a senior health physics technician had been subjected to an adverse action when she was issued an oral reminder – which was the first step in a formal disciplinary process that could ultimately lead to her termination – but that the employer had established by clear and convincing evidence that it would have taken the same action against her even if she had not engaged in the protected activity. In so finding, I relied upon the case of ***Helmstetter v. Pacific Gas and Electric***, 1986-SWD-2 (Sec'y Sept. 9, 1992), which found a disciplinary letter to constitute an adverse action under the environmental whistleblower statutes. In ***Shelton***, however, the ARB modified the Secretary's ruling in ***Helmstetter***, adopting instead the standard espoused in Title VII cases postdating my decision such as ***Oest v. Illinois Dept. of Corrections,*** 240 F.3d 605 (7th Cir. 2001), which held that oral or written reprimands issued under a progressive discipline system do not sufficiently implicate "tangible job consequences" so as to form a basis for liability. ***But see Gutierrez v. Regents of the University of California,*** ARB No. 99-116, 1998 ERA-19 (ARB Nov. 13, 2002) (negative comments in performance evaluation are actionable when accompanied by subsequent limitation of pay increase.) In ***Oest***, 240 F.3d at 613-14, the U.S. Court of Appeals for the Seventh Circuit noted that "adverse actions must be materially adverse to be actionable, meaning more than a 'mere inconvenience or an alteration of job responsibilities' [citation omitted]." ***See also Jenkins, supra*** at 19 ("Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.")

Turning to the first category of charges, no facts have been adduced showing that Complainant was treated differently from other employees with respect to leave policies or that the policies were inherently unfair. Although Mau's alleged May 10 denial of leave may have been retaliatory in nature, it was promptly reversed by Human Resources, so no tangible job consequences are involved. ***See Griffith v. Wackenhut Corp.,*** ARB No. 98-067, 1997-ERA-52 (ARB Feb. 29, 2000) (suspension that was promptly rescinded had resulted in no tangible job consequence). Complainant's perception of disparate treatment based upon the August 22, 2001 absence interview was mainly based upon his failure to consider whether there were more than three disability absences during any rolling 12-month period as opposed to the 12-month period prior to the interview. With respect to his being charged time for visiting a company doctor or for litigation-related activities, Complainant has merely indicated his disagreement with the policies asserted, not that the policies were not uniformly applied. None of the allegations relating to leave have substance.

At this point, a word should be said about Complainant's assertion that one of the absences (apparently that of May 23, 2001) was due to his becoming ill after having worked in the rain without raingear, which he had previously requested. Complainant has **not** asserted that he was assigned to work in the rain as a result of his protected activity or that he was denied the raingear based upon his protected activity. He has, however, argued that his particular absence was misclassified and that it and two other absences (which he claims were related to a July 2000 work injury) should have been deemed work-related. He does not assert that he pursued this matter with Human Resources, or even that he raised the matter with his supervisor. Under these circumstances, I also find this allegation to fall short of stating a cognizable adverse action.

The second category of allegations, which includes the single allegation of counseling for poor rigging practices, also lacks substance, regardless of whether the counseling was warranted. Complainant was counseled for his work by a different supervisor from the one involved in the protected activity, and that supervisor was unaware of the protected activity at the time he did the counseling. Moreover, he counseled the two other employees on the same work team as Complainant in the same manner and there has been no allegation of disparate treatment. Finally, the counseling had no tangible job consequence, as it has not been shown to have led to any disciplinary action or reduction in pay. It is not, accordingly, actionable. ***See Shelton, supra.*** This case is clearly distinguishable from ***Gutierrez, supra***, in which the ARB found "unfavorable customer feedback" in an employee's performance assessment (prepared by the employee's supervisor) to be an adverse action when the comments related to the employee's protected activities under the ERA, were taken into account in determining the employee's pay increase, and suggested that future pay increases would be dependent upon the cessation of protected activities. None of those factors are present in the instant case, which involves a single allegation of counseling based upon work performance. "Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. . . [T]o permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance." ***Shelton*** at 7, quoting ***Davis v. Town of Lake Park, Florida,*** 245 F.3d 1232, 1242 (11th Cir. 2001).

The third category of allegations, relating to the assignment of less desirable job tasks and the denial of a shift change, also lacks tangible job consequences. As a general rule, an allegation of loss of prestige on account of a change in work assignments, without any tangible harm, does not constitute protected activity. ***Davis***, 245 F.3d at 1245. A "bruised ego" is insufficient. ***See Flaherty v. Gas Research Institute***, 31 F.3d 451, 457 (7th Cir. 1994) (age discrimination case). Moreover, as the ARB noted in ***Jenkins*** at 20, citing ***Ledergerber v. Stangler,*** 122 F.3d 1144 (8th Cir. 1997), as a general proposition job transfers not involving a demotion do not rise to the level of a materially adverse employment action, and reassignment of duties falls within the purview of that rule. ***Compare Stone & Webster, supra*** (finding demotion followed by transfer to constitute adverse action). A fortiori, a failure to provide a requested shift transfer would also be insufficient. ***But cf. Mondzelewski v. Pathmark Stores, Inc.***, 162 F.3d 778, 786-89 (3d

Cir. 1998) (assignment to less desirable shift perceived by co-workers as a "punishment shift" may constitute an actionable change in terms and conditions of employment.) Here, Complainant's perception (shared by some of his coworkers) that he has been more frequently assigned less desirable work coupled with his assertion that on a single occasion he was not provided with a requested temporary transfer to a different shift fall short of constituting an adverse action. Complainant has simply failed to assert the type of tangible harm that would make his work or shift assignments actionable.

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The final category consists of allegations of harassment by Complainant's supervisor, including overly zealous supervision. In addition to the work and shift assignment allegations discussed above, the only specific allegations falling within this category concern the incident when Complainant's supervisor reprimanded him (verbally and in performance appraisal data sheets maintained by the supervisor) for "loitering" when he did not return promptly from the rest room and the assertion by a coworker that Complainant's supervisor verbally reprimanded Complainant (and not the coworker) for talking when the coworker initiated the conversation. Those specific allegations do not rise to the level of tangible job consequences, as they involve treatment that is not materially adverse. ***See Hilt-Dyson v. City of Chicago,*** 282 F.3d 456 (7th Cir. 2002) (demeaning uniform inspection insufficient to constitute an adverse employment action.) The more general assertions of harassment – specifically, allegations that Complainant's supervisor said that he was going to "get" him and that his supervisor continually focused on him – are best considered in the context of cases relating to a hostile work environment. In considering whether Complainant was subjected to a hostile work environment, I will consider all of the alleged adverse actions discussed above.

The elements that a complainant must establish in a hostile work environment claim under the ERA were set forth in ***Williams v. Mason & Hanger Corp.***, ARB No. 98-030, 1997-ERA-14 (ARB Nov. 13, 2002):

> 1) that he engaged in protected activity;
> 2) that he suffered intentional harassment related to that activity;
> 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment;
> 4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the Complainant.

To evaluate the "level of hostility" required to establish the existence of a hostile working environment, the factfinder should consider factors such as the frequency and severity of the harassment; whether the harassment was physically threatening or humiliating, or merely offensive; and whether it unreasonably interfered with the complainant's work performance. ***Id.*** As the Supreme Court noted in ***Faragher v. City of Boca Raton,*** 524 U.S. 775, 787 (1998) (in the context of a title VII sex discrimination case), a hostile work

environment is one that is "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."

Applying these factors to the instant case, it is clear that, even accepting all of Complainant's allegations as true, Complainant has failed to establish a hostile work environment. First, the actions complained of were neither frequent nor severe. As discussed above, most of the actions taken reflect that Complainant was treated essentially the same as other employees with respect to leave and employment counseling. The remaining allegations are limited to his alleged unfavorable work assignments (which were allegedly given to him "frequently" and "on numerous occasions"), a vague assertion that his supervisor "continually" focused on him (which has only been supported by isolated allegations),[20] and the single denial of a shift change. I find these allegations are too vague or trivial to establish frequent harassment. Moreover, none of the acts taken could be considered "severe" by any stretch of the imagination. ***See Faragher ,*** 524 U.S. at 788 (1998) (noting that a hostile work environment does not include "ordinary tribulations of the workplace.") Similarly, the alleged harassment was not physically threatening, was not humiliating under any reasonable objective standard, and at most could be considered offensive (although Complainant has not even established the type of work environment that a reasonable person would find offensive). At bottom, the actions complained of amount to a continuation of the close supervision that predated the protected activity. Moreover, none of the actions taken unreasonably interfered with the Complainant's work performance or, indeed, interfered with his job performance at all. In this regard, no action was taken against Complainant that would have the effect of removing job responsibilities implicated in the protected activity or isolating him so that he could not engage in protected activities in the future. ***Cf. Marcus v. EPA***, 1996-CAA-3, 7 (ALJ, Dec. 15, 1998) (Wood)[21] (finding that EPA "pigeonholed [Marcus] in a meaningless position where his actions [could] be closely monitored.") Finally, I find that the harassment alleged here would not detrimentally affect a reasonable person, and Complainant has neither asserted nor shown that it detrimentally affected him.

In ***Berkman, supra,***[22] a case brought under the whistle blower provisions of environmental statues other than the ERA, the Administrative Review Board found that as a result of engaging in protected activity, an environmental engineer employed by the U.S. Coast Guard Academy had been subjected to a hostile working environment and, ultimately, to a constructive discharge.[23] The Board pointed to direct action that was taken "to reduce Berkman's duties, to diminish his responsibilities, and to enforce work place rules against him, but not others." ***Id.*** at 17. The Board indicated that the retaliation fell into two categories: (1) actions that had the effect of taking away Berkman's environmental compliance responsibilities and (2) actions which singled out Berkman for hostile treatment not accorded to other employees. For example, he was treated differently from other employees with respect to leave (***e.g.***, he was placed on AWOL

status when he left a message asking to take leave because his supervisor was unavailable, and he was required to have a supervisor present when making up advanced leave, even though those requirements were not applied to other employees); and he was treated in a harsh and abusive manner (***e.g.***, his second-line superior screamed at him and threatened to sue him for bringing his environmental concerns to higher level management; and he was ridiculed, interrupted, and treated rudely at meetings). The Board reasoned:

> These actions against Berkman **altered his work environment**, and were **pervasive and regular.** In addition, the actions had a very detrimental effect on Berkman, who became completely demoralized, was not able to concentrate enough to work a full day, and eventually could not work at all. As for Berkman's reaction to the hostile actions taken against him, we find that a reasonable person in the same position also would have been affected detrimentally by **the removal of many of his job responsibilities**, the threat of a lawsuit for raising environmental concerns, and the various ways in which the Academy singled him out for **harsh, abusive, and discriminatory treatment**. [Emphasis added.]

(***Berkman*** at p. 21). The Board pointed out that these harassing actions were taken by his supervisors but when he complained to a higher level, the Academy did not put an end to his abuse.

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The case before me is strikingly different from ***Berkman.*** While multiple adverse actions are complained of in the instant case, Complainant has not established that he was subjected to treatment that altered his work environment or was "pervasive and regular," and his treatment cannot reasonably be considered to have been "harsh, abusive and discriminatory." Here, only sporadic, minor events are involved and all actions taken were consistent with policies applicable to all workers. Thus, this case lacks either the "pervasive and regular" element or the "discriminatory" element present in ***Berkman.*** Also, the treatment Complainant received was annoying rather than "harsh or abusive." Unlike Berkman, the Complainant here has not had any job responsibilities taken away from him. Finally, as noted above, Complainant has failed to show (or even allege) that he was detrimentally affected by his work environment, or that a reasonable person would have been detrimentally affected, although Berkman established each of those elements.

Based upon the above, I find that the Complainant cannot establish an essential element of his case – that he was subjected to an adverse employment action – and that summary decision in favor of the Respondent is appropriate, even if the facts are construed in the light most favorable to the Complainant. ***See Moore v. U.S. Dept. of Energy***, ARB No. 99-094, 1999-CAA-14 (ARB July 31, 2001); ***Williams v. Lockheed Martin Corp.***, ARB Nos. 99-54, -64, 1998-ERA-40, -42 (ARB Sept. 29, 2000). In so finding, I am cognizant

of the Complainant's ***pro se*** status. However, Complainant has indicated his desire to proceed on a paper record. My previous Orders directed him to advise of the material facts supporting his claim and of the facts asserted by the Respondent that he disputes. However, even if I construe all of the facts in the light most favorable to him, there simply is not enough here to show that Complainant has been subjected to any adverse actions that are cognizable under the employee protection provisions of the ERA. Inasmuch as Complainant cannot establish this essential element of his claim, there is no reason to conduct an oral hearing in this matter.

CONCLUSION

As Complainant cannot establish that he was subjected to an adverse employment action, even if his allegations are assumed to be true and the factual record is construed in the light most favorable to him, he cannot prevail in this action. It is therefore unnecessary to consider any other issues. Accordingly, I recommend that Complainant' motion for summary decision be denied, that Respondent's motion for summary decision be granted, and that the complaint in this matter be dismissed.

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ORDER

IT IS HEREBY RECOMMENDED that the complaint in this matter be, and hereby is **DISMISSED**.

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. To be timely filed, a petition for review must be filed **within ten (10) business days** of the date of this Recommended Decision and Order and shall be served on all parties and on the Chief Administrative Law Judge. ***See*** 29 C.F.R. §§ 24.7, 24.8.

[ENDNOTES]

[1] CX 1 through 5 consist of copies of the letter complaint initialed by five declarants who indicate in an accompanying statement that they agree with it. Although these statements are also accompanied by declarations made under penalty of perjury, they lack foundation and are not really declarations. Subsequently, as attachments to CX 6, Complainant presented valid declarations. However, Complainant has not authenticated

the statements made in his letter complaint of October 15, 2001 or his rebuttal of September 6, 2002.

[2] Another copy of the Employee Contact Record for Complainant together with a Condition Report relating to the rigging incident, were filed by Complainant on August 6, 2002. Respondent's submission has been marked as RX14, as requested by Respondent [Statement of Material Facts at note 3] and I have marked Complainant's submission as CX7 for identification purposes. The Condition Report appears at RX6, Att. 1 and CX6 (24), but the Employee Contact Record for Complainant does not. Accordingly, it will be admitted for purposes of summary decision proceedings as RX14. The Employee Contact Records (with responses) relating to the other two employees appear as Attachment 1 to Brian Springer's original Affidavit. (RX6, Springer Aff., Att. 1).

[3] In his Rebuttal of September 6, 2002 and exhibits (CX6(1) to (24)), Complainant specifically indicated which assertions he disputed in Respondent's initial set of affidavits and exhibits, and subsequently Respondent provided responsive affidavits and exhibits. Thus, the parties have made it clear which matters are in dispute and which are not. The referenced facts are undisputed unless otherwise indicated.

[4] Complainant's Exhibits will be referenced as CX1 through CX6 and CX6(1) through CX6(24) and Respondent's Exhibits will be referenced as RX1 through RX14. Declarations or affidavits that are exhibits will be referenced by the exhibit number, the last name of the deponent, and (when relevant) the paragraph number (***e.g.,*** RX6, Springer Aff. ¶ 3; CX6(1), Zucarello Dec.) and attachments to affidavits or declarations will be referenced by exhibit number and attachment number (***e.g.,*** RX1, Att.2). Witnesses will be referenced by their last names.

[5] Although incorrectly listed as "1-3-00," "1-6-00," "1-8-00," and "1-9-00," the first page of entries for January 2001 appeared on a sheet entitled "2001 Performance Appraisal Data Sheet," which was actually made in January 2001. (RX1, Att.2; RX 11, Mau Supp. Aff.) Although Complainant has questioned the accuracy of these "PADs" on that basis (Rebuttal p. 2 ¶ 8), it is beyond cavil that references to the date of the previous year during the first part of the following year are, more often than not, mere clerical errors of no significance.

[6] For example, the entry for "1-8 - 12-01" states: "Does as little as possible - not to get caught or get into trouble - Al has problems with HR and I asked HR to talk to Al - I don't know what I can do about him on light duty and he [illegible] can't work overtime. This is with HR." (RX1, Att. 2). On 1-9, the entry states: "Al and Mark flood the 3rd floor locker room. No star [?] - No peer check - doesn't call me when he has problems Al [strike out] makes problems for the group, need to worry about his job only." (***Id.***)

[7] Although Mau indicates that the close out occurred the evening of May 7 and the reopening occurred May 8 (RX1, Mau. Aff.¶4), the contemporaneous documents show that the work began at 8:30 a.m. on May 7 and was incorrectly shown as completed at 2

p.m. on May 8, and the Condition Report #D2001-02550 indicates that the event time was 8:00 a.m. and the discovery date was "05/09/2001." (RX2, 3; CX6(9),(11),(16).).

[8] Mau maintains that he closed out the work package inadvertently. (RX1, Mau. Aff. ¶4). However, Complainant asserts that a package cannot be closed out mistakenly due to the involved procedures that are required. (CX6, Rebuttal ¶ 4; CX6(6),(7),(8),(9).) While Mau asserts that he took immediate action to reopen the work package (RX1, Mau. Aff. ¶4), Complainant asserts that Mau tried to have them work under a "Facility Blanket Ticket" first. (CX6, Rebuttal ¶ 4; CX6(10).)

[9] In considering this Condition Report, I am not determining whose account is correct. However, it is undisputed that the Condition Report included the matter set forth above.

[10] Complainant does not indicate what examples he gave to Polaine aside from the one involving the comments made to Thouvenin.

[11] The parties disagree as to whether the mishap was due to "rigging" or "cribbing," although Springer asserts that the term "rigging" is inclusive of "cribbing." (RX9, Springer Supp. Aff.). Osman denies responsibility for the mishap and asserts that they performed the rigging in accordance with the procedures they were taught during training. (CX6, Rebuttal p. 4 to 5).

[12] It is unclear from the documentation provided that the July 20, 2001 incident was the subject of the grievance, but I will accept counsel's unrefuted representation to that effect. Respondent's Statement of Material Facts ¶37.

[13] The interview occurred on either August 20, 2001 or August 22, 2001. (RX4, Polaine Aff. ¶ 3, Att. III; RX1, Mau Aff. ¶6, Att. 2; CX6, Rebuttal p. 2, 3-4).

[14] Complainant has not asserted that the July 11, 2001 absence interview was retaliatory in nature.

[15] Complainant has not elaborated further on the allegation concerning September 24, and it appears that it either relates to the approval of his absence for the September 25, 2001 meeting or is otherwise related to that meeting.

[16] The Secretary has found that the 1992 amendment of the statute (requiring that the behavior complained of be a "contributing factor" rather than a "motivating factor," the previous standard applicable to ERA cases set forth in ***Mt. Healthy City School District Board of Education v. Doyle,*** 429 U.S. 274 (1977)), did not lessen the complainant's initial burden. ***See Remusat v. Bartlett Nuclear, Inc.***, 1994-ERA-36 (Sec'y Feb. 26, 1996), ***citing Dysert v. Florida Power Corp***., 1993-ERA-21 (Sec'y, August 7, 1995), ***aff'd sub nom Dysert v. Secretary of Labor***, 105 F.3d 607 (11th Cir. 1997).

[17] ***Trimmer*** was only decided under the ERA, as the actions under the environmental statutes were time barred.

[18] While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard. ***Remusat v. Bartlett Nuclear, Inc.***, 1994-ERA-36 (Sec'y Feb. 26, 1996) ***citing Yule v. Burns International Security Service,*** No. 1993-ERA-12 (Sec'y, May 24, 1995). ***See also White v. Turfway Park Racing Ass'n,*** 909 F.2d 941, 944 (6th Cir. 1990), ***citing Street v. J.C. Bradford & Co.,*** 886 F.2d 1472, 1479 (6th Cir. 1989).

[19] In the context of discrimination cases, "direct evidence" (as opposed to circumstantial evidence) has been defined by the Sixth Circuit as evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor. ***See Bartlik v. U.S. Department of Labor,*** 73 F.3d 100, 103 n. 5 (6th Cir. 1996).

[20] The only specific alleged incidents concerned his supervisor requiring that he return promptly from the rest room and his supervisor verbally reprimanding him for talking when another employee was not reprimanded (discussed above).

[21] ***Marcus*** was settled by the parties while an appeal was pending.

[22] The case was later settled following remand to the administrative law judge.

[23] Complainant does not argue that he was constructively discharged in the instant case. Such an allegation would fail as he is still employed by Respondent.